Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-155

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
filed July 27, 1988

CERTIORARI GRANTED October 17, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 22, 1984	Offense committed
August 23, 1984	Affidavit and Information filed
December 10, 1984	Trial commenced
December 13, 1984	Conviction rendered; Judgment of trial court entered
February 26, 1985	Johnson's Notice of Appeal given to Court of Appeals for 5th District of Texas
January 23, 1986	Court of Appeals issued Opinion affirming conviction
February 7, 1986	Johnson's Motion for Rehearing filed in Court of Appeals
February 25, 1986	Court of Appeals overruled Motion for Rehearing without further opinion
March 26, 1986	Johnson's Petition for Discretionary Review to Texas Court of Criminal Appeals filed
March 11, 1987	Texas Court of Criminal Appeals granted Johnson's Petition for Discretionary Review
April 20, 1988	Texas Court of Criminal Appeals issued Opinion reversing and remanding case to the trial court with instructions that the indictment be dismissed
May 3, 1988	State filed a Motion for Rehearing with Texas Court of Criminal Appeals
June 8, 1988	State's Motion for Rehearing overruled by Texas Court of Criminal Appeals without further opinion
July 27, 1988	State filed its Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals
October 17, 1988	Certiorari Petition granted

Defendant: Johnson, Gregory Lee Wm/10-21-51
Charge: Desecrate Venerated Obj.
Address: 615 Blvd. S.E. 6, Atlanta, GA 30312
Location: Jail
Filing Agency: DPD
Date Filed: 8-23-84
Court: #7
Complainant: T. K. Stoker MA8446013-H
C/C
Service No. ——— Arrest No.——— I.D. No. ———

AFFIDAVIT

In the Name and by the Authority of the State of Texas.

PERSONALLY APPEARED before me the undersigned authority this affiant, who after being by me duly sworn, deposes and says your Affiant has good reason to believe and does believe that one GREGORY LEE JOHNSON hereinafter styled Defendant, heretofore, on or about the 22nd day of AUGUST A.D., 1984 in the County of Dallas and State of Texas, did unlawfully did on or about August 22, 1984 intentionally and knowingly desecrate a United States of America flag, to-wit: a national flag, in that the said Gregory Lee Johnson did intentionally and knowingly damage and physically mistreat a United States of America flag by burning the said flag in a way that the said Gregory Lee Johnson knew would seriously offend one or more persons likely to observe and discover his action. Against the peace and dignity of the state.

Sworn to and subscribed before me this the 24 day of Aug. A.D., 1984

/s/ J. Muller
Assistant Criminal District Attorney
of Dallas County, Texas

/s/ A. Capps

Affiant.

Defendant: Johnson, Gregory Lee Wm/10-21-51
Charge: Desecrate Venerated Obj
Address: 615 Blvd. S.E. 6, Atlanta, GA 30312
Location: Jail
Filing Agency: DPD
Date Filed: 8-23-84
Court: #7
Complainant: T. K. Stoker MA8446013-H
C/C
Service No. ——— Arrest No. ——— I.D. No.———

INFORMATION

In the Name and by the Authority of the State of Texas.

NOW COMES THE CRIMINAL DISTRICT ATTORNEY of Dallas County, State of Texas, and presents in and to the County Criminal Court #7 of Dallas County, State aforesaid, that one GREGORY LEE JOHNSON hereinafter styled Defendant, heretofore, on or about the 22nd day of AUGUST A.D., 1984 in the County of Dallas and State of Texas, did unlawfully did on or about August 22, 1984 intentionally and knowingly desecrate a United States of America flag, to-wit: a national flag, in that the said Gregory Lee Johnson did intentionally and knowingly damage and physically mistreat a United States of America flag by burning the said flag in a way that the said Gregory Lee Johnson knew would seriously offend one or more persons likely to observe and discover his action. Against the peace and dignity of the state.

/s/ Henry Wade
Criminal District Attorney of
Dallas County, Texas

DALLAS COUNTY, TEXAS
CRIMINAL DOCKET

THE STATE OF TEXAS VS.
JOHNSON, GREGORY LEE

MA84-46013-H/J

Offense: DESECRATE VENERATED OBJ

Date Filed: Aug. 24, 1984

Date	Orders of the Court
9- 5-84	9-11-84 Ann. (def. present) not necessary 9-11-84
9-11-84	11-12-84 Jury
	11-8-84 Hearing on Motions
11- 8-84	11-12-84 TBJ
11-12-84	12-7-84 Pretrial (def. must be present) 12-10-84 T.B.J.
12- 7-84	Pre-trial
12-10-84	Jury trial begun; ev.
12-11-84	Evidence heard
12-12-84	Evidence continued
12-13-84	Jury trial: Verdict—Guilty. Punishment assessed by the jury at 365 days confinement in the County Jail and a fine of $2,000.00 dollars, costs of court. 2 days credit Def. sentenced. Appeal bond $2,000.00 surety or $750 cash.
1- 9-85	Motion New Trial filed
1-25-85	Defendant held to be indigent for purchase of transcript

No. 84-46013-HJ

	) IN THE COUNTY
STATE OF TEXAS	) CRIMINAL
	) COURT
VS.	) NUMBER EIGHT
	) OF DALLAS
GREGORY LEE JOHNSON	) COUNTY, TEXAS

MOTION TO QUASH

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes GREGORY LEE JOHNSON, Defendant in the above entitled and numbered cause, and files this Motion to Quash the Complaint and Information herein for the following good and sufficient reasons, to-wit:

• • •

5.

That the statute upon which the charge herein is based is unconstitutional for the reason that it is too vague and indefinite, in violation of the Constitutions of the United States of America and of the State of Texas.

(deny)

6.

That the statute upon which the charge herein is based is unconstitutional for the reason that it is overbroad, punishing actions protected under the First Amendment of the Constitution of the United States of America and the Constitution and laws of the State of Texas.

(carry)

7.

That the statute upon which the charge herein is based is unconstitutional as applied to Defendant, a protester, in that the alleged act of burning a United States flag at a demonstration to protest the policies of the United States and the national administration, during the period of the national convention of the Republican Party in Dallas to nominate candidates for the offices of President and Vice-President of the United States, was a type of symbolic speech within the purview of the free speech clause of the First Amendment to the Constitution of the United States.

(carry)

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court grant this Motion in all things, to Quash the Complaint and Information herein, and order the Defendant discharged.

Respectfully submitted,

/s/ Stanley I. Weinberg
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(214) 341-7708

COOPERATING ATTORNEYS
DALLAS CIVIL LIBERTIES
UNION

VERDICT SHEET

(Guilt/Innocence)

(Use the appropriate form below in returning your verdict:)

We, the Jury, find the Defendant "guilty" as charged in the Information.

/s/ Karen A. Anderson
Foreman

/s/ Karen A. Anderson
(Print Name)

(or)

We, the Jury, find the Defendant "not guilty."

Foreman

(Print Name)

VERDICT OF THE JURY

(Punishment)

Having found the defendant guilty of the offense of desecrating a venerated object, we now assess the punishment of the defendant at 1 (one) year in the County Jail, and a fine of $2,000.00.

We further find that the defendant has never been convicted of a felony and we recommend probation of the following, i. e.:

(1) Jail time.....Yes × No

(2) Fine.....Yes × No

/s/ Karen A. Anderson
Foreman of the Jury

JUDGMENT

	) NO. CCR 84-46013-J
THE STATE OF TEXAS	) IN THE COUNTY CRIMINAL
VS.	) COURT
	) DALLAS
GREGORY LEE JOHNSON	) COUNTY, TEXAS
	) ENTERED:
	) DEC 13 A.D. 1984

On this day, this cause being called for trial, came the Criminal District Attorney for the State of Texas, and came the defendant in person and by his attorney; and the defendant being duly arraigned, pleaded not guilty to the charge contained in the information, to-wit:

DESECRATE VENERATED OBJ, AS CHARGED IN THE INFORMATION

And both parties announcing ready for trial, a jury of six good men and true was duly selected, impaneled and sworn, who, having heard the information read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard argument of counsel, retired to consider their verdict, and thereafter returned into the Court in due form of law the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

"We, the jury, find the Defendant guilty as charged in the information.

/s/ KAREN A. ANDERSON
FOREMAN"

And the defendant having requested the Court that his punishment be assessed by the Court, the jury was discharged, and the Court, having heard further evidence submitted on the issue of punishment, and having heard argument of counsel thereon, assessed the defendant's punishment herein at a fine of $2,000.00 and confinement for 365 DAYS in the county jail.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, that the defendant is guilty of

DESECRATE VENERATED OBJ, AS CHARGED IN THE INFORMATION

as found by the jury in its verdict herein returned, and that he be punished by a fine of $2,000.00 and confinement for 365 in the Dallas County Jail, and that the State of Texas do have and recover of him all costs in this prosecution expended.

/s/ J. Hendrik
JUDGE

Form ....., Judgment on Jury Verdict of Guilty and Assessment of Punishment by the Court

---

NO. 84-46013-HJ

STATE OF TEXAS — IN COUNTY CRIMINAL COURT NUMBER EIGHT

VS. — DALLAS COUNTY, TEXAS

GREGORY LEE JOHNSON

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

(Filed February 26, 1985)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant, GREGORY LEE JOHNSON, with leave of Court first obtained, in the above entitled and numbered cause, by and through his counsel of record, and files this his Amended Motion for New Trial, in support of which the Defendant would show, to-wit:

1.

That the Court committed material error calculated to injure the rights of the Defendant by denying Defendant's Motion to Quash the Complaint and Information in this cause.

2.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates the First Amendment to the Constitution of the United States, on its face, and as applied to the States through the Fourteenth Amendment of the Constitution of the United States.

3.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates Article 1, § 8, of the Constitution of the State of Texas and Article 1.16, Texas Code of Criminal Procedure, on its face.

4.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates the First Amendment to the Constitution of the United States, as applied to the Defendant, a protester involved in symbolic speech protected under the Free Speech clause as applied to the States through the Fourteenth Amendment of the Constitution of the United States.

5.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates Article 1, § 8, of the Constitution of the State of Texas and Article 1.16, Texas Code of Criminal Procedure, as applied to the Defendant, a protester involved in symbolic speech.

• • •

WHEREIN, PREMISES CONSIDERED, Defendant prays that the Court set aside the verdict rendered herein and grant him a new trial.

Respectfully submitted,

/s/ Stanley I. Weinberg
STANLEY I. WEINBERG (BC#21085000)
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(214) 747-1232

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635 Jupiter Gardens, S-142
11325 Pegasus Street
Dallas, Texas 75238
(214) 341-7708

COOPERATING ATTORNEYS
DALLAS CIVIL LIBERTIES UNION

Motion for New Trial Denied.

/s/ J. Hendrik 2-26-85

TRIAL COURT'S RULING ON PRE-TRIAL MOTION TO QUASH

* * *

The Court: I don't think I can rule on Six or Seven until we really hear all of the facts of the case because I believe the cases hold without any question that this statute is not, on its face, unconstitutional. It just may be unconstitutionally applied.

* * *

Then on Six and Seven, what I'll do is I'll carry—carry Paragraph Six and Seven until after—at least until after the State rests—

* * *

—to determine what—whether or not there might be an unconstitutional application in this particular—particular case.

* * *

DEFENDANT'S ORAL MOTION FOR INSTRUCTED VERDICT

(End of State's Case-in-Chief)

Mr. Weinberg: * * *

Number one, * * * the State (sic) (statute), that they're attempting to prosecute the Defendant under is unconstitutional as implied (sic) (applied) under the First Amendment of the Constitution of the United States to a protester.

* * *

this was part of a legitimate political protest during a period of political activity here in Dallas, that the War

Chest Tour was a part of the process involving a political protest;

* * *

under the prevailing authorities and the Supreme Court opinions, that a state's interest in prosecuting, in preventing breaches of the peace, that a failure to show that there was an imminent breach of the peace since this was a police-escorted and monitored demonstration activity that contained political speeches including chants that are all protected under the First Amendment, and the Statute attempted to be applied in this prosecution would be unconstitutional as applied to the Defendant who was involved in the political protest.

We also would argue that the Statute, * * * is overbroad

* * *

Mr. Skemp: The only thing I would add is evidence that the flag burning itself was part of the political expressions.

The fact that the crowd gathered around the flag, the fact that this immediately produced a—an organized chant or responses to it showing disrespect or showing a non-agreement with the policies of the United States and your, "Red, white and blue, spit on you," does not show it to be just an act of anarchy but an organized political activity of these people's parts involved with political expression during the Republican Convention, and under the case of Monroe versus State, Court of Fulton County, it's really undistinguishable.

* * *

Mr. Weinberg: The act of burning a flag at such a demonstration is a type of symbolic speech within the purview of the First Amendment of the Constitution.

* * *

The Court: All right. Deny your request for an instructed verdict.

* * *

Mr. Skemp: And are you also denying the motion to quash the indictment or are you still going to carry that through the rest of the case?

The Court: Yes.

* * *

DEFENDANT'S ORAL MOTION FOR INSTRUCTED VERDICT

(Conclusion of All Evidence)

Mr. Weinberg: At this point in the trial comes the Defendant, * * * all the evidence having been presented, both sides having rested and closed, and reurges his motion for instructed verdict of not guilty, reurging the Constitutional grounds * * * that any burning of the flag that occurred * * * was a—an act of symbolic speech, symbolizing protest against policies of the United States and that application of the Statute * * * in this case would be unconstitutional as applied to the Defendant who had been shown to have been taking part in the demonstration as a demonstrator.

* * *

The Court: * * *

Your motion for instructed verdict is denied, and note your exception.

* * *

Gregory Lee JOHNSON, Appellant,

v.

The STATE of Texas, Appellee.

No. 05-85-00318-CR.

Court of Appeals of Texas,
Dallas.

Jan. 23, 1986.

Rehearing Denied Feb. 25, 1986.

Defendant was convicted in the County Criminal Court No. 8, Dallas County, John C. Hendrick, J., of desecration of a venerated object for burning United States flag during demonstration, and he appealed. The Court of Appeals, Vance J., held that: (1) statute was neither unconstitutionally vague nor overbroad; (2) defendant was not deprived of First Amendment rights; and (3) videotape depicting extraneous conduct of other persons was relevant.

Affirmed.

Stanley I. Weinberg, Douglas W. Skemp, Dallas, for appellant.

John Nation, Dallas, for appellee.

Before VANCE, MALONEY and McCLUNG, JJ.

VANCE, Justice.

Gregory Lee Johnson appeals from a jury trial conviction for desecration of a venerated object. During the

Republican National Convention, Johnson set fire to a United States flag in front of Dallas City Hall, during the course of an anti-Reagan rally. The jury assessed punishment at one year's confinement in county jail and a $2,000.00 fine.

In fourteen grounds of error, Johnson contends that: (1-8) Section 42.09 of the Texas Penal Code violates the First Amendment to the United States Constitution, Article I, Sec. 8 of the Texas Constitution, and Article 1.16 of the Texas Code of Criminal Procedure as an unconstitutional restraint on Johnson's right to free speech; (9) the trial court erred in instructing the jury on the law of parties; (10-11) the trial court erred in admitting into evidence a videotape depicting extraneous conduct of other persons and in refusing to grant a limiting instruction on it; (12) the trial court erred during the punishment stage in admitting, over objection, evidence of Johnson's prior convictions which were never disclosed to Johnson in violation of the trial court's disclosure order; (13) the trial court erred by overruling Johnson's objection to the prosecutor's jury argument during punishment; and (14) the trial court erred in overruling Johnson's objection to the prosecutor's closing argument. Because we find no error, we affirm the judgment of the trial court.

In grounds of error one through eight, Johnson contends that the application of section 42.09 of the Texas Penal Code is unconstitutionally vague, unconstitutionally overbroad, and violative of his first amendment rights. The statute provides:

> (a) A person commits an offense if he intentionally or knowingly desecrates:

(1) a public monument;

(2) a place of worship or burial; or

(3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

Johnson claims that the statute is unconstitutionally vague because "desecration" depends upon the sensibilities of persons likely to observe the action. A statute that either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess as to its meaning and differ as to its application lacks the first essentials of due process. *Ely v. State*, 582 S.W.2d 416, 419 (Tex.Crim.App.1979). However, due process merely requires that the law give sufficient warning so that people may conduct themselves so as to avoid that which is forbidden. *McCarty v. State*, 616 S.W.2d 194, 196 (Tex.Crim. App.1981). Due process does not demand that the words used in a statute be specially defined. Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not to be considered vague and indefinite. *Floyd v. State*, 575 S.W.2d 21, 23 (Tex.Crim.App.1978). Here, the relevant terms of the offense, "deface," "damage," and "physically mistreat" are all well understood terms. The act of burning the United States flag would clearly constitute desecration under the statute.

Johnson also contends that the statute is unconstitutionally overbroad. A statute is overbroad when it prohibits both activity which is protected by the constitution and activity which is not. *Baker v. State*, 478 S.W.2d 445, 448 (Tex.Crim.App.1972). Johnson's argument is without merit. While the flag burning did occur during a political protest rally, the statute in no way prohibited legitimate protest activities.

Johnson further urges that the statute violates his rights to free speech under the First and Fourteenth Amendments. In *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), the Supreme Court adopted a two-part analysis for flag desecration cases: the appellate court must determine, first, whether the conduct is protected under the First Amendment; and second, whether, upon the record of the given case, the interests advanced by the state are so substantial as to justify infringement of appellant's constitutional rights. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 573 (11th Cir.1984).

Thus, we must first determine whether Johnson's act of burning the flag is constitutionally-protected free speech. On appeal, the State does not dispute this. Nonverbal expression may be a form of free speech entitled to first amendment protection. *See Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (attaching peace sign to a flag is a form of free speech); *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black armbands in school is akin to pure speech).

To determine whether Johnson's conduct is entitled to First Amendment protection, we must consider "the nature of appellant's activity combined with the factual con-

text and environment in which it was undertaken." *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). If appellant shows "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," *Spence*, at 410-11, 94 S.Ct. at 2730, then the activity is protected speech under the First and Fourteenth Amendments. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 571 (11th Cir.1984).

Here, Johnson was convicted of burning the United States flag during a public demonstration protesting the policies of President Ronald Reagan and the Republican Party during the 1984 Republican National Convention. The record reflects that Johnson and his fellow protesters participated in anti-Reagan chants and "die-ins," as well as burning the flag in front of Dallas City Hall. This suggests that Johnson intended to convey a particularized message his dissatisfaction with the Reagan Administration's policies, and that this message was very likely to be understood by those who viewed it. *See Monroe v. State Court of Fulton County*, 739 F.2d 568, 572 (11th Cir.1984). Johnson's act was not one of "mindless nihilism." *Spence*, 418 U.S. at 410, 94 S.Ct. at 2730. Therefore, we conclude that Johnson's act of burning the flag constituted symbolic speech requiring First Amendment scrutiny.

Next, we must determine, given the record before us, whether the interests advanced by the State are so substantial as to justify infringement of Johnson's constitutional rights. The State advances two interests: prevent-

ing breaches of the peace and protection of the flag as a symbol of national unity.

The first substantial interest asserted by the State is to prevent breaches of the peace. This is a valid state interest. *Street v. New York*, 394 U.S. 576, 590-92, 89 S.Ct. 1354, 1364-65, 22 L.Ed.2d 572 (1969). Some courts have concluded that an act of flag desecration by itself is insufficient provocation to infringe upon First Amendment rights; they require objective evidence of imminent public unrest. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 575 (11th Cir.1984); *Sutherland v. DeWulf*, 323 F.Supp. 740, 745 (S.D.Ill. 1971). Other courts have held that acts of flag desecration are, of themselves, so inherently inflammatory that the State may act to prevent breaches of the public peace. *Deeds v. State*, 474 S.W.2d 718, 721 (Tex. Crim.App.1971); *Radich v. Criminal Court*, 385 F.Supp. 165, 180-82 (S.D.N.Y. 1974). We choose to follow the Texas Court of Crimina! Appeals in preferring the latter view. Thus, the statute is a legitimate and constitutional means of protecting the public peace.

The second substantial interest asserted by the State is the preservation of the flag as a symbol of national unity. The flag has been held to be a "unifying factor" which "facilitates a citizen's identification with his country." *Monroe*, 739 F.2d at 574. The Texas Court of Criminal Appeals has also found the flag to be a symbol of national unity. *Deeds v. State*, 474 S.W.2d 718, 720-21 (Tex.Crim.App.1971). While the State has no legitimate interest in compelling respect for the flag, *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), we disagree with the

Eleventh Circuit in *Monroe* and hold that the State does have a legitimate and substantial interest in protecting the flag as a symbol of national unity. Thus, we hold that section 42.09 is constitutional. Johnson's grounds of error one through eight are overruled.

In his ninth ground of error, Johnson contends that the trial court erred in instructing the jury on the law of parties. The instruction was submitted without objection. Johnson claims the instruction constituted egregious harm because there was no evidence to support this theory. To require reversal the harm must be so egregious as to have denied Johnson "a fair and impartial trial." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim.App.1985). We must look at the degree of the harm in light of the entire jury charge, the evidence and the record as a whole. *Almanza*, 686 S.W.2d at 177.

The State's evidence showed that Johnson burned the flag by himself. The jury charge includes an application paragraph conditioning Johnson's guilt on a finding that he acted alone or as a party. The record reflects that the bulk of the State's argument was premised on Johnson's culpability as a sole actor. Thus, it is unlikely that the jury was misled by the instruction.

Johnson also claims that the instruction impermissibly shifted the burden of proof, citing *Allen v. State*, 686 S.W.2d 685 (Tex. App.—San Antonio, 1985). However this case was decided before *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim.App.1985) and might have been decided differently if analyzed under *Almanza*. Here, the evidence shows more than Johnson's guilt as a party; it shows his guilt as a sole actor. The burden of proof was

not shifted, and no egregious harm occurred. Johnson's ninth ground of error is overruled.

In his grounds of error ten and eleven, Johnson alleges that the trial court erred in admitting into evidence a videotape depicting extraneous conduct of other persons and refusing to give a limiting instruction on it. The trial court admitted a videotape, Exhibit 11, consisting of police and television news films of the protest activities. News commentary was excised from the film, and the videotape was played without any sound. As a general rule, the State is allowed to show the facts and circumstances surrounding the offense, in order to put it in context before the jury. *Jackson v. State*, 575 S.W.2d 567, 570 (Tex.Crim.App.1979). After reviewing the videotape, we do not find it to be inherently prejudicial; we do find it to be relevant to establishing the context of the offense. *See, Maddox v. State*, 682 S.W.2d 563 (Tex.Crim. App.1985). Because the acts of other persons depicted in the videotape were part of the res gestae of Johnson's offense, no limiting instruction was required. *Archer v. State*, 607 S.W.2d 539, 542 (Tex.Crim.App.1980). Johnson's tenth and eleventh grounds of error are overruled.

In his twelfth ground of error, Johnson contends the trial court erred, during punishment, in admitting, over his objection, evidence of Johnson's prior convictions which were never disclosed to Johnson in violation of the trial court's disclosure order. However, Johnson has waived any error regarding this contention due to his failure to seek a postponement or a continuance in response to the unexpectedly offered convictions. *Lindley*

v. State, 635 S.W.2d 541, 544 (Tex.Crim.App.1982). Johnson's twelfth ground of error is overruled.

In his thirteenth ground of error, Johnson complains of error in the prosecutor's jury argument. During his final argument at punishment the prosecutor stated:

> And you know that he's also creating a lot of danger for a lot of people by what he does and the way he thinks. What did Mr. Walker tell you from the evidence he would have done had he been there? He would have tried to stop it. What would the man with a gun on his chest [referring to his tee-shirt's logo] and his running buddies have done to Mr. Walker if he tried to stop it.

Johnson's objection to the argument on the basis that it called for speculation and was unsupported by the evidence was overruled. To require reversal allegedly improper argument must be extreme or manifestly improper or inject new and harmful facts into the record. *Brooks v. State*, 642 S.W.2d 791, 798 (Tex.Crim.App.1982). Here, the prosecutor's argument speculated on the possibility that Johnson's conduct could have led to a breach of the peace. Because the argument did not clearly speculate that Johnson would have committed acts of violence, it is not so manifestly improper as to require reversal. Johnson's thirteenth ground of error is overruled.

In his fourteenth ground of error, Johnson again complains of improper jury argument. During punishment, the prosecutor argued:

> and when you go back into that jury room you represent each and everyone of them; and don't forget it.

Johnson's objection that the argument called for the jury to base its results on community expectations was overruled. The prosecutor further urged the jury to "consider the community effect of your verdict." Johnson's objection to this comment was also overruled. These arguments properly referred to the jury's status as representative of the community as a whole and as such were permissible as proper pleas for law enforcement. *Whittington v. State*, 580 S.W.2d 845, 847 (Tex.Crim.App.1979). Johnson's fourteenth ground of error is overruled.

Because we find no error, we affirm the judgment of the trial court.

Affirm.